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6                   UNITED STATES DISTRICT COURT  
7                   WESTERN DISTRICT OF WASHINGTON  
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9                   TRINA L. HOPTOWIT,

10                  Plaintiff,

11                  v.

12                  CAROLYN W. COLVIN, Acting  
13                  Commissioner of Social Security,

14                  Defendant.

15                   NO. C14-5532-JLR-JPD

16                   REPORT AND  
17                  RECOMMENDATION

18                  Plaintiff Trina L. Hoptowit appeals the final decision of the Commissioner of the Social  
19                  Security Administration (“Commissioner”) that denied her applications for Disability  
20                  Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI  
21                  of the Social Security Act, 42 U.S.C. §§ 401-33 and 1381-83f, after a hearing before an  
22                  administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that  
23                  the Commissioner’s decision be REVERSED and REMANDED for further proceedings.

24                  I.         FACTS AND PROCEDURAL HISTORY

25                  At the time of the administrative hearing, Plaintiff was a 34-year-old woman with an  
26                  eleventh-grade education and additional training in adult health care. Administrative Record  
27                  (“AR”) at 671, 676-79. Her past work experience includes employment as an office manager  
28                  and home health care aide. AR at 121. Plaintiff was last gainfully employed in February 2010.

1 AR at 120.

2 On January 31, 2011, Plaintiff protectively filed claims for SSI payments and DIB,  
3 alleging a disability onset date of December 15, 2009. AR at 103-04, 116, 622-27. Plaintiff  
4 asserts that she is disabled due to chronic back pain, sciatica, memory loss, anxiety, bone spurs  
5 in her neck, depression, post-traumatic stress disorder, morbid obesity, and knee problems. AR  
6 at 119.

7 The Commissioner denied Plaintiff's claim initially and on reconsideration. AR at 75-  
8 77, 79-80. Plaintiff requested a hearing, which took place on April 27, 2012. AR at 667-719.  
9 On September 28, 2012, the ALJ issued a decision finding Plaintiff not disabled and denied  
10 benefits based on his finding that Plaintiff could perform a specific job existing in significant  
11 numbers in the national economy. AR at 20-36. After reviewing additional evidence, the  
12 Appeals Council denied Plaintiff's request for review. AR at 7-11. On July 2, 2014, Plaintiff  
13 timely filed the present action challenging the Commissioner's decision. Dkt. 1, 3.

14 II. JURISDICTION

15 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§  
16 405(g) and 1383(c)(3).

17 III. STANDARD OF REVIEW

18 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
19 social security benefits when the ALJ's findings are based on legal error or not supported by  
20 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th  
21 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is  
22 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.  
23 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750  
24 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in

1 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,  
 2 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a  
 3 whole, it may neither reweigh the evidence nor substitute its judgment for that of the  
 4 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is  
 5 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that  
 6 must be upheld. *Id.*

7 The Court may direct an award of benefits where "the record has been fully developed  
 8 and further administrative proceedings would serve no useful purpose." *McCartey v.*  
 9 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292  
 10 (9th Cir. 1996)). The Court may find that this occurs when:

11 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the  
 12 claimant's evidence; (2) there are no outstanding issues that must be resolved  
 13 before a determination of disability can be made; and (3) it is clear from the  
 14 record that the ALJ would be required to find the claimant disabled if he  
 15 considered the claimant's evidence.

16 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that  
 17 erroneously rejected evidence may be credited when all three elements are met).

#### 18 IV. EVALUATING DISABILITY

19 As the claimant, Ms. Hoptowit bears the burden of proving that she is disabled within  
 20 the meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th  
 21 Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in  
 22 any substantial gainful activity" due to a physical or mental impairment which has lasted, or is  
 23 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§  
 24 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments  
 are of such severity that she is unable to do her previous work, and cannot, considering her age,  
 education, and work experience, engage in any other substantial gainful activity existing in the

1 national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-  
 2 99 (9th Cir. 1999).

3       The Commissioner has established a five step sequential evaluation process for  
 4 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§  
 5 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At  
 6 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at  
 7 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step  
 8 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.  
 9 §§ 404.1520(b), 416.920(b).<sup>1</sup> If she is, disability benefits are denied. If she is not, the  
 10 Commissioner proceeds to step two. At step two, the claimant must establish that she has one  
 11 or more medically severe impairments, or combination of impairments, that limit her physical  
 12 or mental ability to do basic work activities. If the claimant does not have such impairments,  
 13 she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe  
 14 impairment, the Commissioner moves to step three to determine whether the impairment meets  
 15 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),  
 16 416.920(d). A claimant whose impairment meets or equals one of the listings for the required  
 17 twelve-month duration requirement is disabled. *Id.*

18       When the claimant’s impairment neither meets nor equals one of the impairments listed  
 19 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s  
 20 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the  
 21 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work

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 23       <sup>1</sup> Substantial gainful activity is work activity that is both substantial, i.e., involves  
 24 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §  
 404.1572.

1 to determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If  
2 the claimant is able to perform her past relevant work, she is not disabled; if the opposite is  
3 true, then the burden shifts to the Commissioner at step five to show that the claimant can  
4 perform other work that exists in significant numbers in the national economy, taking into  
5 consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§  
6 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the  
7 claimant is unable to perform other work, then the claimant is found disabled and benefits may  
8 be awarded.

## V. DECISION BELOW

On September 28, 2012, the ALJ found:

1. The claimant meets the insured status requirements of Act through December 31, 2014.
2. The claimant has not engaged in substantial gainful activity since December 15, 2009, the alleged onset date.
3. The claimant's disk disease of the lumbar spine; morbid obesity; depression; anxiety disorder, not otherwise specified, with features of posttraumatic stress disorder; polysubstance abuse in remission; and borderline personality disorder with histrionic features and cluster B traits are severe.
4. The claimant does not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1.
5. The claimant has the RFC to perform light work as defined in 20 C.F.R. §§ 404.1567(b) and 416.967(b), except she is limited to standing or walking about two hours of an eight-hour workday and sitting about six hours of an eight-hour workday. She should have a sit/stand option while remaining on task. She can have occasional right foot control. The claimant can occasionally perform postural activities, except she should not climb ladders, ropes or scaffolds and can frequently stoop. The claimant can have frequent exposure to excess vibration. The claimant can have occasional exposure to the operational control of moving machinery, unprotected heights, or hazardous machinery. The claimant can perform simple, routine and repetitive tasks. The claimant should not interact with the public as

1 part of her job duties, but can have incidental public contact. The  
2 claimant can have occasional interaction with coworkers.

3 6. The claimant is unable to perform any past relevant work.  
4 7. The claimant was born on XXXXX, 1977, and was 32 years old,  
which is defined as a younger individual age 18-49, on the alleged  
disability onset date.<sup>2</sup>  
5 8. The claimant has at limited education and is able to communicate in  
English.  
6 9. Transferability of job skills is not material to the determination of  
disability because using the Medical-Vocational Rules as a framework  
supports a finding that the claimant is “not disabled,” whether or not  
the claimant has transferable job skills.  
7 10. Considering the claimant’s age, education, work experience, and RFC,  
there are jobs that exist in significant numbers in the national economy  
that the claimant can perform.  
8 11. The claimant has not been under a disability, as defined in the Act,  
from December 15, 2009, through the date of the decision.

9 AR at 22-36.  
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## VI. ISSUES ON APPEAL

12 The principal issues on appeal are:  
13  
14 1. Whether the ALJ properly found Plaintiff not credible.  
15 2. Whether ALJ’s RFC assessment is based on substantial evidence; and  
16 3. Whether the ALJ erred in finding at step five that Plaintiff can do other work.  
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18 Dkt. 13 at 1.

## VII. DISCUSSION

### A. The ALJ Did Not Err in Discounting Plaintiff’s Credibility.

20 One of Plaintiff’s examining psychologists, Terilee Wingate, Ph.D., indicated that  
21 Plaintiff was malingering as to her cognitive functioning. AR at 634, 637-38. The  
22 psychologist included a malingering diagnosis among Plaintiff’s “established diagnoses.” AR  
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<sup>2</sup> The actual date is deleted in accordance with Local Rule CR 5.2, W.D. Washington.

1 at 633. This psychologist's report was submitted for the first time to the Appeals Council,  
2 although the report was written in May 2011, during the relevant period and more than a year  
3 before the ALJ's decision. AR at 6. The ALJ cited other evidence suggesting malingering  
4 and/or exaggeration. AR at 31 (citing AR at 312-13 (discussing positive Waddell signs), 551  
5 (Plaintiff reporting less pain during physical therapy exercises while distracted), 600 (Plaintiff  
6 appearing less uncomfortable and displays increased range of motion during physical therapy,  
7 yet reports to her therapist that her pain is 10/10)). The Commissioner concedes that the  
8 evidence characterized as demonstrating "malingering" by the ALJ would be more properly  
9 considered as evidence of "exaggeration." Dkt. 17 at 6.

10 Evidence of exaggeration supports an ALJ's adverse credibility determination.  
11 *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001) (holding that a credibility  
12 determination based on, among other things, a tendency to exaggerate, was supported by  
13 substantial evidence). Although the ALJ did not have the opportunity to consider Dr.  
14 Wingate's May 2011 evaluation report, its malingering diagnosis further supports his adverse  
15 credibility determination. See *Brewes v. Comm'r of Social Sec. Admin.*, 682 F.3d 1157, 1163  
16 (9th Cir. 2012) (directing the district court to consider Appeals Council evidence when  
17 reviewing an ALJ's decision for substantial evidence). Dr. Wingate's report addresses  
18 Plaintiff's concern that her tendency to exaggerate was due to her personality disorder, rather  
19 than malingering (Dkt. 13 at 18-19): Dr. Wingate performed a psychological evaluation, noted  
20 Plaintiff's potential personality disorder (AR 633), and yet described her malingering test  
21 results as evidence that she is "likely faking a memory impairment." AR at 633. In light of  
22 this affirmative evidence of malingering, the ALJ's adverse credibility determination should be  
23 affirmed.

1       B.     The ALJ Did Not Err in Assessing Plaintiff's RFC as to Physical and Mental  
2                   Limitations.

3               Plaintiff argues that the ALJ erred in (1) relying on State agency medical opinions that  
4               pre-date her back surgery, without further developing the record to determine what limitations  
5               existed post-surgery, and (2) discounting the April and June 2011 opinions of consultative  
6               psychiatrist James Parker, M.D. The Court will address each category of evidence in turn.

7               1.     *Standards for Reviewing Medical Evidence*

8               As a matter of law, more weight is given to a treating physician's opinion than to that  
9               of a non-treating physician because a treating physician "is employed to cure and has a greater  
10              opportunity to know and observe the patient as an individual." *Magallanes*, 881 F.2d at 751;  
11              see also *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). A treating physician's opinion,  
12              however, is not necessarily conclusive as to either a physical condition or the ultimate issue of  
13              disability, and can be rejected, whether or not that opinion is contradicted. *Magallanes*, 881  
14              F.2d at 751. If an ALJ rejects the opinion of a treating or examining physician, the ALJ must  
15              give clear and convincing reasons for doing so if the opinion is not contradicted by other  
16              evidence, and specific and legitimate reasons if it is. *Reddick v. Chater*, 157 F.3d 715, 725  
17              (9th Cir. 1988). "This can be done by setting out a detailed and thorough summary of the facts  
18              and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Id.*  
19              (citing *Magallanes*, 881 F.2d at 751). The ALJ must do more than merely state his/her  
20              conclusions. "He must set forth his own interpretations and explain why they, rather than the  
21              doctors', are correct." *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).  
22              Such conclusions must at all times be supported by substantial evidence. *Reddick*, 157 F.3d at  
23              725.  
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1       The opinions of examining physicians are to be given more weight than non-examining  
2 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Like treating physicians, the  
3 uncontradicted opinions of examining physicians may not be rejected without clear and  
4 convincing evidence. *Id.* An ALJ may reject the controverted opinions of an examining  
5 physician only by providing specific and legitimate reasons that are supported by the record.  
6 *Bayliss*, 427 F.3d at 1216.

7       Opinions from non-examining medical sources are to be given less weight than treating  
8 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the  
9 opinions from such sources and may not simply ignore them. In other words, an ALJ must  
10 evaluate the opinion of a non-examining source and explain the weight given to it. Social  
11 Security Ruling 96-6p, 1996 WL 374180, at \*2. Although an ALJ generally gives more weight  
12 to an examining doctor's opinion than to a non-examining doctor's opinion, a non-examining  
13 doctor's opinion may nonetheless constitute substantial evidence if it is consistent with other  
14 independent evidence in the record. *Thomas*, 278 F.3d at 957; *Orn*, 495 F.3d at 632-33.

15       2.       *State Agency Opinions*

16       Plaintiff argues that the ALJ erred in relying on the opinions rendered by the State  
17 agency consultants (AR at 63-65, 428-35), given that those opinions were written before her  
18 back surgery. Dkt. 13 at 9-10. According to Plaintiff, the ALJ should have obtained a  
19 consultative examination or called on a medical expert to review the entire record. Dkt. 13 at  
20 10.

21       Although Plaintiff characterizes her back surgery as a "substantial change in  
22 circumstances" (Dkt. 13 at 9), she does not show that any of her symptoms or limitations  
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1 changed afterward,<sup>3</sup> and instead characterizes her symptoms as “continuing” after the surgery.  
 2 Dkt. 13 at 9-10. Thus, Plaintiff has failed to establish error in the ALJ’s RFC assessment. The  
 3 ALJ was not obligated to further develop the record because he did not find the record to be  
 4 inadequate. *See Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001) (“An ALJ’s duty to  
 5 develop the record further is triggered only when there is ambiguous evidence or when the  
 6 record is inadequate to allow for proper evaluation of the evidence.”).

7       3.     *Dr. Parker’s Opinions*

8       Dr. Parker examined Plaintiff twice, in April and June 2011. AR at 229-32, 405-09. In  
 9 April 2011, Dr. Parker opined that Plaintiff “is able to do simple tasks, but likely would have  
 10 difficulties sustaining attention and accuracy. During the interview, her behavior is regressed  
 11 and she has labile emotion.” AR at 232. In June 2011, Dr. Parker opined that Plaintiff  
 12 is not able to maintain normal pace and responses to questions. She is very  
 13 slow and delayed. She has no recall for the immediate memory items. During  
 14 the interview, her affect is somewhat disengaged, it seems somewhat  
 regress[ed]. She does not appear to be capable of interacting in a work situation  
 based on today’s mood and affect.

15 AR at 408-09. The ALJ discounted both opinions, explaining that both of Dr. Parker’s  
 16 opinions indicated similar findings, and yet Dr. Parker found Plaintiff to be “much more”  
 17 restricted in June 2011. AR at 33. The ALJ also found that Dr. Parker’s opinions were  
 18 inconsistent with other evidence showing, *inter alia*, intact memory and good performance on  
 19 concentration tasks. *Id.* The ALJ also indicated that Dr. Parker’s June 2011 functional opinion

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20       <sup>3</sup> Plaintiff’s citations to medical findings in the Appeals Council evidence and other  
 21 evidence considered by the ALJ are unavailing, because none of the findings are accompanied  
 22 by opinions as to their effect on Plaintiff’s ability to function, and thus it is not clear how this  
 23 evidence undermines the ALJ’s RFC assessment and thereby establishes harmful error. Dkt.  
 24 13 at 10-12. For example, Plaintiff discusses new evidence that may be relevant to the ALJ’s  
 step-three findings (Dkt. 13 at 10-11), but has not assigned error to the ALJ’s step-three  
 findings. Furthermore, to the extent that Plaintiff has identified contradictions in the medical  
 record before the ALJ, the ALJ is entitled to resolve those contradictions. *See Carmickle v.*  
*Comm’r of Social Sec. Admin.*, 533 F.3d 1155, 1164 (9th Cir. 2008).

1 was inconsistent with his Global Assessment of Functioning score, which corresponds to only  
2 moderate symptoms or moderate difficulties in functioning. *Id.* Lastly, the ALJ noted that Dr.  
3 Parker qualified his opinion, as based on a one-time evaluation. *Id.*

4 Plaintiff argues that none of the ALJ's reasons to discount Dr. Parker's opinions is  
5 legally sufficient. The Court disagrees as to the ALJ's finding regarding inconsistencies with  
6 other evidence, and Dr. Parker's own qualification of his findings. An ALJ properly considers  
7 whether a medical opinion is consistent with other evidence in the record, and the ALJ here  
8 reasonably interpreted evidence in the record to be inconsistent with Dr. Parker's opinions  
9 regarding Plaintiff's memory and concentration deficits. AR at 33 (citing *inter alia* AR at 209,  
10 244, 568). Furthermore, Appeals Council evidence in the record provides additional support  
11 for the ALJ's findings regarding memory test results. AR at 634 (diagnosing memory  
12 malingering).

13 Also, Dr. Parker's June 2011 opinion acknowledges what is true of any examining  
14 provider's opinion: the provider's observations are limited to what is presented during the  
15 examination. *See* AR at 409 ("She does not appear to be capable of interacting in a work  
16 situation based on today's mood and affect."). Dr. Parker reviewed few records before  
17 rendering his opinion. AR at 405. The depth of Dr. Parker's relationship with Plaintiff is a  
18 legitimate consideration for the ALJ. *See* 20 C.F.R. § 404.1527(c).

19 C. The ALJ Erred at Step Five.

20 At the administrative hearing, the ALJ asked the vocational expert ("VE") to assume  
21 that the hypothetical claimant required, *inter alia*, a sit/stand option. AR at 713-14. The VE  
22 testified that the hypothetical claimant could perform the job of production assembler and  
23 assembler/electrical accessories I, assuming that the claimant would not need to change  
24

1 positions any more frequently than once every half-hour. AR at 713-14.<sup>4</sup> The VE further  
 2 testified that his testimony was consistent with the Dictionary of Occupational Titles (“DOT”).  
 3 AR at 716.

4 An ALJ has an affirmative responsibility to inquire as to whether a VE’s testimony is  
 5 consistent with the DOT and, if there is a conflict, determine whether the VE’s explanation for  
 6 such a conflict is reasonable. *Massachi v. Astrue*, 486 F.3d 1149, 1152-54 (9th Cir. 2007). As  
 7 stated by the Ninth Circuit: “[A]n ALJ may rely on expert testimony which contradicts the  
 8 DOT, but only insofar as the record contains persuasive evidence to support the deviation.”  
 9 *Johnson v. Shalala*, 60 F.3d 1428, 1435-36 (9th Cir. 1995).

10 Sit/stand options are not addressed in the DOT. Plaintiff argues that because the VE’s  
 11 testimony about whether the identified jobs could accommodate a sit/stand option is not based  
 12 on the DOT, the VE should have disclosed the DOT inconsistency and explicitly explained the  
 13 basis for his testimony. The Commissioner argues that the basis for the VE’s testimony was in  
 14 fact explicated because the ALJ stated at the outset of the VE’s testimony that he would  
 15 “assume [the VE’s] testimony is based on [his] knowledge, education, training and experience  
 16 and is consistent with the DOT unless [he] tell[s] me otherwise.” AR at 702.

17 The ALJ’s assumption does not cure the VE’s failure to reveal the DOT inconsistency.  
 18 See *Flores v. Astrue*, 546 Fed. Appx. 638, 640-41 (9th Cir. Nov. 1, 2013). Furthermore, it  
 19 appears that there may have been some discrepancy between the RFC requirement of a  
 20 sit/stand option and the VE’s testimony regarding the frequency of a position change: a  
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22 <sup>4</sup> The Commissioner contends that the VE testified that the job numbers for the  
 23 production assembler position would be eroded due to the sit/stand option requirement, but the  
 24 Commissioner is mistaken. Dkt. 17 at 15. The VE testified that the erosion would occur due  
 to the ALJ’s overall sitting and standing limitations, before the sit/stand option was even  
 mentioned. AR at 713. The VE did not indicate that any erosion of job numbers would occur  
 as a result of the sit/stand option. AR at 713-14.

1 sit/stand option indicates the freedom to sit or stand at will, not necessarily only every half-  
2 hour. *Compare* AR at 25 with AR at 713-14; *see also Buckner-Larkin v. Astrue*, 450 Fed.  
3 Appx. 626, 627 (9th Cir. Sep. 20, 2011) (defining a sit/stand option). On remand, the ALJ  
4 should conduct additional proceedings to ensure that the VE hypothetical includes all  
5 limitations and that the vocational testimony is supported by substantial evidence.

## VIII. CONCLUSION

7 For the foregoing reasons, the Court recommends that this case be REVERSED and  
8 REMANDED to the Commissioner for further proceedings not inconsistent with the Court's  
9 instructions. A proposed order accompanies this Report and Recommendation.

10 Objections to this Report and Recommendation, if any, should be filed with the Clerk  
11 and served upon all parties to this suit by no later than **March 13, 2015**. Failure to file  
12 objections within the specified time may affect your right to appeal. Objections should be  
13 noted for consideration on the District Judge's motion calendar for the third Friday after they  
14 are filed. Responses to objections may be filed within **fourteen (14)** days after service of  
15 objections. If no timely objections are filed, the matter will be ready for consideration by the  
16 District Judge on **March 20, 2015**.

17 This Report and Recommendation is not an appealable order. Thus, a notice of appeal  
18 seeking review in the Court of Appeals for the Ninth Circuit should not be filed until the  
19 assigned District Judge acts on this Report and Recommendation.

DATED this 27th day of February, 2015.

*James P. Donohue*  
JAMES P. DONOHUE  
United States Magistrate Judge